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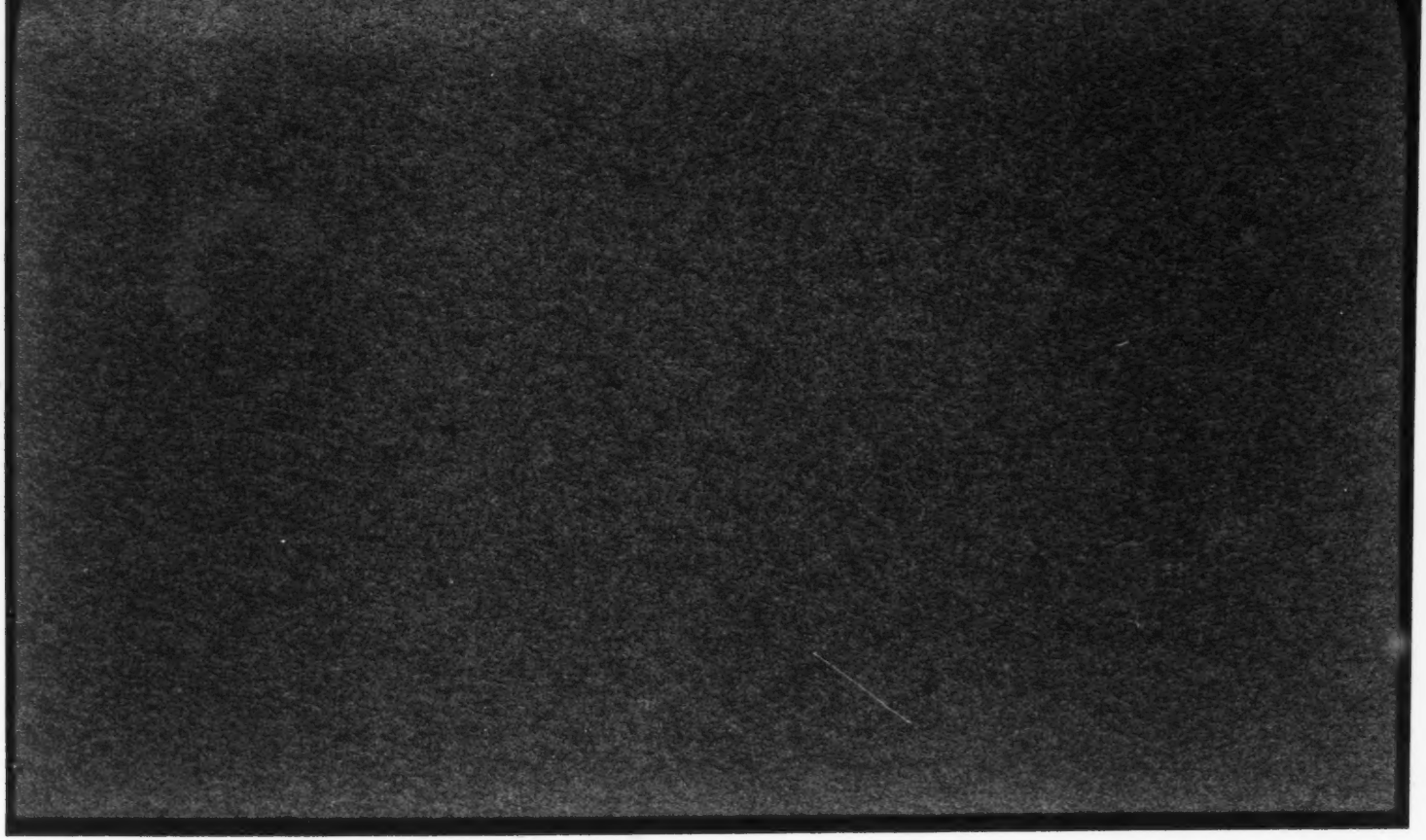

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Danforth v. *United States*, 308 U. S. 271	6, 8, 9
Peabody v. *United States*, 231 U. S. 530	6
Portsmouth Co. v. *United States*, 250 U. S. 1; same, 260 U. S. 327	6
United States v. *Appalachian Power Co.*, 311 U. S. 377, 406–407	8
United States v. *Miller*, 317 U. S. 369	7, 8
United States v. *Sponenbarger*, 308 U. S. 256	5, 8
Statutes:	
Act of June 25, 1910, 36 Stat. 835, Section 4	2
Act of August 26, 1937, c. 832, 50 Stat. 844, 850	3, 11
Miscellaneous:	
22 *The Americana*, p. 119	3
Lewis, *Law of Eminent Domain* (3d ed.) § 964	9
18 *New International Encyclopaedia*, p. 676	3
Webster's *New International Dictionary* (2d ed.), p. 3109	3

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 786

PITT RIVER POWER COMPANY (A CORPORATION),
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 67–69) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered December 7, 1942 (R. 69). The petition for writ of certiorari was filed March 4, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the legislative approval and authorization of the Central Valley project in California and the partial construction of a dam which is intended, when completed, to impound water which will overflow petitioner's land, constitute a present taking of petitioner's property by the United States for which compensation is recoverable.

STATUTE INVOLVED

The appropriate portion of the statute involved is set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

Petitioner, a California corporation, brought this suit in the Court of Claims to recover compensation for an alleged taking of its property. The allegations of its complaint may be summarized as follows:

On December 2, 1935, the President of the United States, pursuant to Section 4 of the Act of June 25, 1910, 36 Stat. 835, approved the recommendation of the Secretary of the Interior that the Central Valley development in California be constructed as a Federal reclamation project (R. 6, 60–66). That project embodied a plan for the conservation, regulation, distribution, and utilization of the water resources of the Sacramento and San Joaquin Rivers (R. 60). It contemplated the restoration of commercial navigation on the upper Sacramento River, increased

flood protection for the valley land, and incidentally the generation of hydroelectric energy (R. 61). The key unit of the project was to be the Kennett Reservoir on the Sacramento River which would store 3,000,000 acre-feet of water to be impounded by a dam 420 feet high (R. 61).

By the Act of August 26, 1937, Congress recognized and approved the Central Valley project as a reclamation project and empowered the Secretary of the Interior to proceed with its development, transferring jurisdiction over the expenditure of an appropriation of $12,000,000 for the project from the Secretary of War to the Secretary of the Interior (R. 6–7). On October 19, 1937, under the direction of the Secretary of the Interior, construction work was commenced on the Kennett-Shasta Dam and has proceeded continuously since that date (R. 7).

Petitioner is the owner of or otherwise interested in tracts of land in Shasta County, California, which are located on or near the Pitt River,[1] a tributary of the Sacramento River. Because of the conformation of the land and the large and constant flow of the Pitt River, whose water may be impounded by dams which can be

[1] The correct spelling of this name is Pit River. Webster's *New International Dictionary* (2d ed.), p. 3109, title Pit River; 22 *The Americana*, p. 119, title Pit-River Indians; 18 *New International Encyclopaedia*, p. 676, title Pit River Indians. Cf. R. 3, 10A. However, petitioner's name as used in the pleadings adopts the form "Pitt," so we, as did the court below, adopt that usage throughout.

erected on excellent dam sites on these lands, the property in question is peculiarly adapted for large reservoirs for water supply purposes and, in combination with certain other lands, is suited to the development of a hydroelectric project. (R. 6.)

The complaint further alleged that the construction and operation of the Kennett or Shasta Dam and Reservoir were intended to and will flood the lands along the Sacramento River and its tributaries many miles above the location of the dam, including a great part of petitioner's lands located along the Pitt River (R. 7); that the part of petitioner's lands which will be thus flooded has been taken by the United States without petitioner's consent; that other lands of petitioner which will not be flooded by the project have been damaged by the proposed erection of the dam and reservoir; and that the riparian rights of petitioner in the Pitt River have been taken by the United States (R. 7). Petitioner stated that the United States has failed to condemn its property and has not compensated petitioner therefor (R. 8), and asked judgment in the sum of $6,000,000, with interest from the date of the alleged taking (R. 9).

The United States demurred to the petition (R. 66). The Court of Claims sustained the demurrer, holding that there had as yet been no taking of petitioner's property, that there might never be a taking of its property, and that the action was premature (R. 67–69).

ARGUMENT

Petitioner admits that the construction of the proposed dam and reservoir has not been completed, and it does not allege that its lands have been flooded or otherwise physically occupied or damaged (Pet. 2, 13). It merely contends, as it did below, that there has been a taking of its property by the United States as a result of the enactment of the Act of August 26, 1937 (*infra*, pp. 11–12), which authorized the Central Valley project and contemplated the construction of a dam and reservoir that will ultimately overflow petitioner's land (Pet. 2, 13). Petitioner further argues that as a result of the passage of the 1937 Act, its property has been compelled to lie idle and it has been prevented from proceeding to develop its hydroelectric project; and that such circumstances constitute an appropriation of its property (Pet. 13). We submit that the court below properly held that these contentions are without merit.

1. Neither the adoption of the Central Valley plan, the legislative approval of the project, nor the commencement of construction, constituted a taking of petitioner's property by the United States. The situation here involved falls within the category of such decisions as *United States* v. *Sponenbarger*, 308 U. S. 256, where the adoption of a project contemplating the use of plaintiff's land for a spillway and the enactment of legislation authorizing the project were held not to

amount to a taking, and *Danforth* v. *United States,* 308 U. S. 271, where even the construction of some of the physical facilities necessary to put the project into operation was thought not to be an appropriation prior to actual use of the land as envisioned by the project. The claim of taking in the instant case is no less premature than that involved in the *Danforth* case, for in both cases the physical facilities contemplated by the project were not complete at the time of the alleged taking. There is at best a present apprehension of a future taking, which it is clear does not warrant the recovery of compensation. *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Co.* v. *United States,* 250 U. S. 1; same, 260 U. S. 327. As the Court below appropriately observed (R. 68):

> The beginning of construction does not necessarily mean that it will be completed. The lands in question are located on a tributary stream. No portion of such lands has as yet been flooded. It is not certain that any part of them will be. It is anticipated that some of the lands will be flooded when and if the Shasta Dam is completed. However, the plans may be modified by the Chief Engineer with the approval of the head of the department. The height of the dam may be changed. The available funds may be withdrawn by act of Congress, or any supplemental funds needed to finish the project may be denied.

The project may be abandoned or, for any one of a number of reasons, may not be completed in accordance with the original plan. Essential elements of a taking are lacking.

The sole reason advanced in the petition for granting the writ (Pet. 3) appears to be the decision of this Court in *United States* v. *Miller,* 317 U. S. 369. That case, which also involved the Central Valley project, held that in determining compensation payable in condemnation proceedings a jury may not take into consideration increase in value resulting from the circumstances that the lands taken were within an authorized project or were likely to be taken for the project (317 U. S. at p. 379). Petitioner argues from this decision that any decrease in value of its property due to and arising after the legislative authorization of the project in the 1937 Act must be disregarded in determining just compensation; and it reasons that the enactment of the authorizing statute therefore constituted a taking of its property (Pet. 3–4). Assuming petitioner's premise to be sound, nevertheless the conclusion does not follow. The principles of value enunciated in the *Miller* case had reference to an eminent domain proceeding instituted by the Government in connection with a declaration of taking (317 U. S. at p. 371), and elements of value prop-

erly to be considered in assessing compensation for a taking can have little relevance to the determination of whether and when a taking has occurred; in fact, implicit in much of the opinion (317 U. S., pp. 374–379) is a recognition that land is not taken the instant that its eventual requirement for the project becomes probable or even certain.

2. There is likewise no merit to petitioner's contention that the authorization of the Central Valley project has deprived it of the use of dam sites on its property suitable for the creation of a reservoir for irrigation and hydroelectric purposes. Beside the fact that the pleadings contain nothing to suggest that petitioner is legally in a position to make such use of its lands,[2] no claim of taking can be predicated upon the circumstance that a possible use of petitioner's lands is rendered inadvisable because of the likelihood that the land will eventually be flooded. Cf. *Danforth* v. *United States,* 308 U. S. 271, 285–286; *United States* v. *Sponenbarger,* 308 U. S. 256, 267.

[2] In the absence of an allegation to the contrary, it may be assumed that the Pitt River is a navigable stream either because in fact navigable or susceptible of being made so by improvements (*United States* v. *Appalachian Power Co.*, 311 U. S. 377, 406–407). On this assumption, petitioner has no legal authority to place any dam or obstruction in the river without the consent of the United States, *id.*, p. 424, and no such consent is alleged.

Petitioner's claim that the substantial value of its property for reservoir, dam site and water power purposes was destroyed by the passage of the Act (Pet. 3) is of no avail. Any reduction in the value of property occurring "by reason of legislation for or the beginning or completion of a project" is merely one of the "incidents of ownership" which "cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States,* 308 U. S. 271, 285.[3] Even if the value of the property for reservoir purposes be assumed pertinent to the question of value when a taking actually occurs, but it does not give rise to a claim of taking, particularly where, as in this case, there is no allegation of intention or desire (see R. 6) to use the property for such purposes with which the construction of Shasta Dam has interfered.

[3] Petitioner also argues that a time eventually will occur when there is a taking of its property; that such time should now be legally fixed, and that the valuation eventually placed upon its property should neither be increased nor decreased by reason of the progress of the project (Pet. 13–15). This argument seems footless. It is possible that petitioner's lands never will be overflowed or otherwise taken. If they are eventually taken, the value which should then be placed upon them can be determined in suitable proceedings. And of course the statute of limitations, which petitioner fears may bar its rights unless it can sue at once (Pet. 16), cannot begin to run until the taking actually occurs. Lewis, *Law of Eminent Domain,* (3d ed.), § 964.

CONCLUSION

The decision below is correct and presents no conflict. We respectfully submit, therefore, that the petition for writ of certiorari should be denied.

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APRIL 1943.